

Halifax, NS
lukacs@AirPassengerRights.ca



June 3, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. WestJet
Complaint concerning WestJet's policies and practices relating to claims for delay,
damage, and loss of baggage**

Please accept the following submissions as a formal application against WestJet for failing to apply the terms and conditions of carriage set out in WestJet's International Tariff and/or applying terms and conditions that are contrary to the *Montreal Convention*, and thus unreasonable.

The present application is brought pursuant to sections 27 and 29 of the *Canada Transportation Act*, S.C. 1996, c. 10 ("CTA"), sections 111(1), 113, 113.1, and 122(c) of the *Air Transportation Regulations*, SOR/88-58 ("ATR"), and section 40 of the *Canadian Transportation Agency General Rules*.

FACTS

Overview

Successive carriage is a situation where several airlines (carriers) participate in performing a single contract of carriage. For example, a passenger travelling on a Halifax-London Heathrow ticket may be transported from Halifax to Toronto by one airline, and from Toronto to London Heathrow by another airline.

Liability for delay, damage, and loss of baggage in the case of successive carriage is governed by Article 36(3) of the *Montreal Convention*, an international treaty that has the force of law in Canada. Article 36(3) imposes joint and several liability on the following carriers:

- (a) first carrier;
- (b) the carrier which performed the leg during which the loss, damage, or delay took place;
- (c) last carrier.

The present application alleges that WestJet has been systematically refusing to process and settle baggage-related claims in cases where WestJet is the first carrier; instead, WestJet's policy and practice has been to insist that passengers communicate with the last carrier. WestJet has been citing IATA Resolution 780 in support of its position.

The Applicant submits that these policies and practices are: (a) not set out in WestJet's International Tariff; and (b) inconsistent with the *Montreal Convention*, and as such they are unreasonable.

The Applicant is asking the Agency to order WestJet to amend its practices and procedures (and tariff, if necessary) to comply with Article 36(3) of the *Montreal Convention*.

WestJet's International Tariff

A copy of WestJet's International Tariff Rule 55(A) is attached and marked as Exhibit "A". Rule 55(A) states that:

(A) FOR TRAVEL GOVERNED BY THE MONTREAL CONVENTION

FOR THE PURPOSE OF INTERNATIONAL CARRIAGE GOVERNED BY THE MONTREAL CONVENTION, THE LIABILITY RULES SET OUT IN THE MONTREAL CONVENTION ARE FULLY INCORPORATED HEREIN AND SHALL SUPERSEDE AND PREVAIL OVER ANY PROVISIONS OF THIS TARIFF WHICH MAY BE INCONSISTENT WITH THOSE RULES.

WestJet's policies and practices

WestJet is involved in successive carriage of passengers with a number of other airlines, such as British Airways and China Southern Airlines, with WestJet being the "first carrier."

WestJet's policy and/or practice is to refuse to process and settle claims relating to delay, damage, or loss of baggage in situations where WestJet performed the first but not the last leg of the passenger's itinerary. In such cases, WestJet insists that the passenger seek compensation from the "last carrier." WestJet has been using the following template texts to implement these policies and/or practices:

WestJet in accordance with our partner [FINAL CARRIER], will respectfully follow IATA Resolution 780, which states that the airline on which the passenger travelled to final destination shall be responsible for raising the Property Irregularity Report (PIR).

Therefore, it remains the responsibility of [FINAL CARRIER] to settle your claim and reach resolution.

A copy of WestJet’s email, which follows these templates, to Ms. Rhiannon Jones, dated May 13, 2014, is attached and marked as Exhibit “B”.

A copy of WestJet’s email, which follows these templates, to the Applicant, dated May 13, 2014, is attached and marked as Exhibit “C”.

Regardless of the actual wording used by WestJet, the thrust of these communications was that WestJet refuses to settle the passenger’s claim based on IATA Resolution 780.

It is alleged that these two are not isolated incidents, but rather represent WestJet’s policies and practices with respect to claims relating to delay, damage, and loss of baggage in cases where WestJet is not the last carrier.

ISSUES

- I. Are WestJet’s policies and practices consistent with the *Montreal Convention*? 4
- II. Did WestJet fail to apply terms and conditions of carriage set out in its International Tariff? 6
- III. Are WestJet’s policies and practices reasonable? 6

EXHIBITS

- A. WestJet International Tariff Rule 55(A). 8
- B. Email of WestJet to Ms. Jones, dated May 13, 2014. 9
- C. Email of WestJet to Dr. Lukács, dated May 13, 2014 11

I. Are WestJet's policies and practices consistent with the *Montreal Convention*?

The *Montreal Convention*

The *Montreal Convention* is an international treaty that has the force of law in Canada by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26. It governs, among other things, the liability of air carriers in case of delay, damage, and loss of baggage in international carriage.

Article 26 prevents carriers from contracting out, circumventing, or altering the liability provisions of the *Montreal Convention* to the passengers' detriment:

Article 26 - Invalidity of contractual provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 36 of the *Montreal Convention* governs the liability of carriers in the case of successive carriage. Article 36(3) determines liability for baggage as follows:

Article 36 - Successive carriage

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

[Emphasis added.]

Article 36(3) contains two provisions. First, it specifies three types of carriers against whom the passenger has a right of action: the first carrier, the carrier which performed the carriage during which the incident occurred, and the last carrier. Second, Article 36(3) imposes *joint and several liability* upon these carriers.

Joint and several liability means that each carrier is independently liable for the entire amount of the damage caused, and the passenger may collect the full amount from any one of the carriers listed in Article 36(3). Thus, it is up to the passenger to decide from which of the carriers it is going to seek payment. (Carriers can subsequently settle such matters among themselves, but that is the internal business of the carriers, and none of that affects the rights of passengers.)

Therefore, the objective of Article 36(3) is to provide passengers with additional protection and enhance their ability to obtain compensation by preventing carriers from sending passengers on a wild goose chase by pointing at each other.

Article 36(3) of the *Montreal Convention* leaves no doubt that WestJet is liable to passengers for delay, damage, or loss of their baggage if WestJet was the first carrier. Consequently, WestJet cannot refuse to process and settle such claims, nor can WestJet insist that passengers seek compensation from the last carrier. (If WestJet compensates such a passenger, then WestJet may seek reimbursement of this amount from the last carrier according to the agreement between WestJet and the last carrier.)

Hence, WestJet's policies and/or practices to insist that passengers seek baggage-related compensation from the last carrier are inconsistent with the *Montreal Convention*, they are tending to relieve WestJet from liability laid down in the Convention, and as such they are null and void pursuant to Article 26.

IATA Resolution 780

WestJet's one and only argument for refusing to process and settle baggage-related claims in cases where WestJet was the first carrier is based on IATA Resolution 780.

The International Air Transport Association (IATA) is an association of airlines; it represents the commercial interests of airlines. Thus, IATA resolutions may be binding upon its members, but have no legal effect on third parties, such as passengers.

IATA Resolution 780, entitled "Form of Interline Traffic Agreement - Passenger," governs the form of certain contracts among airlines. This document, which appears to be unavailable to the public and which has not been disclosed to passengers in any way, can have no legal effect on the rights of passengers. Instead, it can only govern inter-airline accounting practices and inter-airline settling of compensations paid to passengers.

Consequently, IATA Resolution 780 is not capable of having any legal consequences for passengers seeking compensation for delay, damage, or loss of their baggage.

Therefore, IATA Resolution 780 does not relieve WestJet from liability to passengers for baggage-related claims in cases where WestJet was the first carrier.

Hence, WestJet cannot rely on IATA Resolution 780 as an excuse to refuse to process and settle claims arising from delay, damage, or loss of baggage in cases where WestJet was the first carrier.

II. Did WestJet fail to apply terms and conditions of carriage set out in its International Tariff?

WestJet's International Tariff Rule 55(A) (Exhibit "A") fully incorporates the *Montreal Convention*, and provides that the Convention prevails over any provision that may be inconsistent with the Convention.

As noted earlier, WestJet's policies and practices of refusing to process and settle baggage-related claims in cases where WestJet is the first carrier are inconsistent with the *Montreal Convention*.

Thus, WestJet failed to apply the provisions of the *Montreal Convention*, which are the terms and conditions of carriage set out in the International Tariff.

The Applicant is asking the Agency to order WestJet, pursuant to section 113.1(a) of the *ATR*, to amend its practices and procedures to comply with Article 36(3) of the *Montreal Convention*.

III. Are WestJet's policies and practices reasonable?

Since the impugned policies and practices of WestJet are inconsistent with the *Montreal Convention*, they are null and void pursuant to Article 26 of the *Montreal Convention*; alternatively, they would be null and void if they were incorporated as contractual terms.

In *McCabe v. Air Canada*, 227-C-A-2008, the Agency held (at para. 29) that a tariff provision that is null and void by Article 26 of the *Montreal Convention* is not just and reasonable as required by s. 111(1) of the *ATR*. This principle was applied by the Agency in *Lukács v. Air Canada*, 208-C-A-2009 (at paras. 38-39), and in *Lukács v. WestJet*, 477-C-A-2010 (at para. 43; leave to appeal denied by the Federal Court of Appeal; 10-A-41).

Thus, it is settled law that a tariff provision that is inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable within the meaning of s. 111(1) of the *ATR*.

Therefore, it is submitted that WestJet's impugned policies and practices fail to be reasonable, contrary to s. 111(1) of the *ATR*.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Andrew Kay, Senior Legal Counsel for WestJet
Lorne Mackenzie, Director of Regulatory and Government Affairs for WestJet

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
4. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

5. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

Case law

6. *Lukács v. Air Canada*, Canadian Transportation Agency, 208-C-A-2009.
7. *Lukács v. WestJet*, Canadian Transportation Agency, 477-C-A-2010.
8. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-41.
9. *McCabe v. Air Canada*, Canadian Transportation Agency, 227-C-A-2008.

- (11) GUARDIAN FARE BOOKINGS ARE CREATED UNDER A SEPARATE RESERVATION CODE FROM THE CHILD(REN) .
- (12) GUARDIAN FARE BOOKINGS CAN ONLY BE MADE AND MODIFIED THROUGH THE CARRIER'S CONTACT CENTRE.
- (13) ONCE THE OUTBOUND PORTION OF THE FLIGHT(S) HAS BEEN TAKEN, ANY CANCELLATION OF ADDITIONAL FLIGHTS ON THE GUARDIAN'S RESERVATION WILL RESULT IN A FULL LOSS OF THE REMAINING FARE, FEES, TAXES AND SURCHARGES ASSOCIATED. NO COMPENSATION WILL BE ISSUED IN ANY FORM.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0055

TITLE/APPLICATION - 70

A LIMITATION OF LIABILITY - PASSENGERS

- (A) FOR TRAVEL GOVERNED BY THE MONTREAL CONVENTION FOR THE PURPOSE OF INTERNATIONAL CARRIAGE GOVERNED BY THE MONTREAL CONVENTION, THE LIABILITY RULES SET OUT IN THE MONTREAL CONVENTION ARE FULLY INCORPORATED HEREIN AND SHALL SUPERSEDE AND PREVAIL OVER ANY PROVISIONS OF THIS TARIFF WHICH MAY BE INCONSISTENT WITH THOSE RULES.
- (B) FOR TRAVEL GOVERNED BY THE WARSAW CONVENTION CARRIAGE HEREUNDER MAY BE SUBJECT TO THE RULES AND

-24-

GFS TEXT MENU RULE CATEGORY TEXT DISPLAY
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0055

TITLE/APPLICATION - 70 (CONT)

LIMITATIONS RELATING TO LIABILITY ESTABLISHED BY THE WARSAW CONVENTION, OR SUCH CONVENTION AS AMENDED, UNLESS SUCH CARRIAGE IS NOT "INTERNATIONAL CARRIAGE" AS DEFINED BY THE WARSAW CONVENTION. WITH RESPECT TO ALL INTERNATIONAL TRANSPORTATION, AS DEFINED IN THE SAID CONVENTION, PERFORMED BY IT, THE CARRIER AGREES THAT THE LIMIT OF LIABILITY FOR EACH PASSENGER FOR DEATH OR WOUNDING OR OTHER BODILY INJURY SHALL BE LIMITED TO PROVEN DAMAGES NOT TO EXCEED THE SUM OF 100,000 SPECIAL DRAWING RIGHTS, EXCLUSIVE OF LEGAL FEES AND DISBURSEMENTS.

- (C) FOR TRAVEL GOVERNED BY EITHER THE MONTREAL CONVENTION OR THE WARSAW CONVENTION NOTHING HEREIN SHALL BE DEEMED TO AFFECT THE RIGHTS AND LIABILITIES OF THE CARRIER WITH REGARD TO ANY PERSON WHO HAS WILLFULLY CAUSED DAMAGE WHICH RESULTED IN DEATH, WOUNDING, OR OTHER BODILY INJURY OF A PASSENGER. THE CARRIER DOES NOT MAINTAIN, OPERATE OR PROVIDE GROUND TRANSPORTATION BETWEEN AIRPORTS, OR BETWEEN AIRPORTS AND CITY CENTRES. ANY SUCH SERVICES ARE PERFORMED BY INDEPENDENT CONTRACTORS WHO ARE NOT, AND SHALL NOT BE DEEMED TO BE THE AGENTS OF EMPLOYEES OF THE CARRIER. THE CARRIER SHALL NOT BE LIABLE FOR THE ACTS OR OMISSIONS OF ANY SUCH INDEPENDENT CONTRACTORS.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0060

Gmail - Fwd: Claim pursuant to Article 17 of the...

<https://mail.google.com/mail/u/0/?ui=2&ik=25da...>

From: Susie Felker <sfelker@westjet.com>
Date: May 13, 2014 at 8:31:13 CST
To: ""rhiannon.jones85@gmail.com"" <rhiannon.jones85@gmail.com>
Subject: RE: Claim pursuant to Article 17 of the Montreal Convention

Good Morning Ms. Jones,

Thank you for contacting WestJet and providing feedback regarding file PENCZ12267. The records provided state that your itinerary began with WestJet in Regina, Saskatchewan where you checked in and flew to Vancouver, British Columbia on WestJet flight 313 on 06DEC13. From there, you connected to China Southern flight 330 from Vancouver to Guangzhou, China and onto your final destination with China Southern flight 395 to Penang, Malaysia. WestJet in accordance with our partner China Southern, will respectfully follow IATA Resolution 780, which states that the airline on which the passenger travelled to final destination shall be responsible for raising the Property Irregularity Report (PIR). In your case, the property irregularity report was created in Penang Malaysia by China Southern (PENCZ12267). The resolution goes on to say that any carrier can begin the search for a delayed bag (or item such as a bike) from a system perspective. However, it is the final carrier who is responsible to settle the claim and reach final resolution with the guest. As indicated by Janice, WestJet Central Baggage Service Specialist on February 13, 2014, WestJet found a potential match to your delayed bike and provided China Southern and yourself with the information to match and track this file. Therefore, it remains the responsibility of China Southern to settle your claim and reach resolution.

Thank you,

Susie Felker
Manager - Central Baggage Services | Proration Officer
WestJet | 403-539-7503

From: Rhiannon Jones [<mailto:rhiannon.jones85@gmail.com>]
Sent: Monday, April 28, 2014 1:48 PM
To: Lorne Mackenzie
Subject: Claim pursuant to Article 17 of the Montreal Convention

Dear Mr. Mackenzie,

Please see the attached letter.

Sincerely yours,
Rhiannon Jones

Gmail - Fwd: Claim pursuant to Article 17 of the...

<https://mail.google.com/mail/u/0/?ui=2&ik=25da...>

Sincerely yours,
Rhiannon Jones

From: sfelker@westjet.com Tue May 13 16:34:20 2014
Date: Tue, 13 May 2014 14:34:17 +0000
From: Susie Felker <sfelker@westjet.com>
To: "'dr.gabor.lukacs@gmail.com'" <dr.gabor.lukacs@gmail.com>
Subject: RE: Notice of claim pursuant to the Montreal Convention

Good morning Mr. Lukacs,

Thank you for contacting WestJet regarding delayed baggage file BUDBA51265. WestJet in accordance with our partner British Airways, will respectfully follow IATA Resolution 780, which states that the airline on which the passenger travelled to final destination shall be responsible for raising the Property Irregularity Report (PIR). In your case, the property irregularity report was created by British Airways in Budapest, Hungary (PENCZ12267) on April 29, 2014. The final carrier is responsible to settle the claim and reach final resolution with the passenger. Therefore, it remains the responsibility of British Airways to settle your claim and reach resolution.

Thank you,

Susie Felker
Manager - Central Baggage Services | Proration Officer
WestJet | 403-539-7503

-----Original Message-----

From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: Tuesday, May 06, 2014 4:47 PM
To: Carol McCall; jim.blaney@ba.com; Lorne Mackenzie
Subject: Notice of claim pursuant to the Montreal Convention

Dear Ms. McCall, Mr. Mackenzie, and Mr. Blaney:

I am writing to request that WestJet and British Airways compensate me, pursuant to Articles 19 and 36(3) of the Montreal Convention, for the delay of my checked baggage enroute from Halifax (YHZ) to Budapest (BUD) on flights WS 279 / BA 92 / BA 866 on April 28-29, 2014.

A baggage irregularity report, under reference number BUDBA51265, has been completed upon my arrival in Budapest.

Due to the delay of my baggage, I had to go shopping on the day of my arrival, and I incurred out-of-pocket expense in the amount of CAD\$25.70 (5064 HUF charged to my credit card) for soap, toothbrush, toothpaste, shampoo and deodorant. A receipt of these purchases is available, and I will be happy to send you a photograph or scan should you request me to do so.

At this point, I am prepared to accept the amount of CAD\$25.70 in full and complete settlement of the matter; however, should WestJet and/or British Airways not settle the matter amicably, I reserve my right to seek further damages.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs